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## **Part V**

## **Department of the Treasury**

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**Fiscal Service**

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**31 CFR Part 205**

**Rules and Procedures for Fund  
Transfers; Final Rule**

were received addressing the basis upon which the word "State" was defined. The NPRM proposed using the lists of Dependent State Agencies published by the United States Bureau of the Census as an initial baseline. Ten commenters filed explicit disfavor with using the Census lists, while several other commenters stated that the FMS should be flexible in interpreting or excluding entities on the Census lists if the policy of using the lists is to be retained. The FMS has removed the policy of using the lists in the Final Rule because of the opposition expressed in the comments and because the lists are outdated or incomplete in many instances.

Suggestions to allow each State to define its agencies and instrumentalities in the Treasury-State Agreements were received from 12 commenters. An additional 10 commenters recommended making the definition of State dependent on whether the State has direct fiscal control over a particular entity, with different criteria for what constitutes fiscal control being offered. These comments were not incorporated because the concept of equity contained in CMIA requires that all States be treated equally. If each State were allowed to define its agencies and instrumentalities, or base inclusion on the degree of direct fiscal control, there would be a significant variance as to what type of programs would be covered on a State-by-State basis.

The NPRM noted that other options for defining State were under consideration, such as basing the definition on Generally Accepted Accounting Principles (GAAP) or deriving it from Office of Management and Budget (OMB) Circulars on grant administration (i.e., A-102 and A-110). Twenty-three commenters did support the option of excluding from the provisions of CMIA all State entities subject to OMB Circular A-110, or suggested that universities specifically should be exempted. Because State chartered institutions of higher education are clearly instrumentalities of States, it would be inconsistent with CMIA to exempt them or to rely on a definition which would exclude them. Accordingly, suggestions to exempt universities or to exempt entities covered by OMB Circular A-110 were not incorporated.

Six commenters suggested using the GAAP definition of the State reporting entity, or the State's most recent Consolidated Annual Financial Report (which is generally based on GAAP). The Final Rule replaces reliance on the Census lists with GAAP principles. This change has been incorporated because

GAAP represents a standard which is recognized by States and the Federal Government. It is noted that as many commenters as were in favor of GAAP were opposed to it because of its extensive scope and because it would result in inclusion of State chartered universities and colleges. Although it would be inconsistent with CMIA to exempt institutions of higher education, or to otherwise substantially limit the inclusive definition of State in CMIA, the Final Rule does provide for a phase-in of institutions of higher education. Unless otherwise specified in a Treasury-State Agreement, the provisions of Subpart A do not apply to institutions of higher education until the start of a State's 1995 fiscal year. This deferral was included to provide States and institutions of higher education an extended opportunity to resolve the difficulties created by the autonomous nature of many State chartered colleges and universities.

*Scope—Programs for which the payment of interest is inconsistent with program purposes:* NPRM § 205.10(e) Exception [Final Rule § 205.12(d) Exception]. CMIA requires States to pay interest on Federal funds received in advance of need "when not inconsistent with program purposes." This exception recognizes that under certain programs interest on Federal funds is to be applied to program purposes or is legally required to be retained by the State. This exception applies solely to the payment of interest from States to the Federal Government. Therefore, a State may be excepted from paying interest to the Federal Government under a certain program, but the program is still subject to all other requirements of CMIA and this Final Rule, including the requirements for coverage in the Treasury-State Agreements, application of a funding technique, and the accrual and payment of interest from the Federal Government to a State. Although States may be excepted from paying interest to the Federal Government under these types of programs, the general principle that a State and a Federal agency must minimize the time between the transfer of funds from the Treasury and the time that the State needs the funds for program purposes is still applicable. If a State is found to be drawing funds in advance of need, then the State will be considered in non-compliance with this regulation and/or a Treasury-State Agreement, and the provisions of § 205.17(k) may be initiated.

*Scope—Catalog of Federal Domestic Assistance:* NPRM § 205.3 Scope [Final Rule § 205.2 Scope of Part]. Several

commenters requested clarification of whether certain types of programs would be covered by the regulation, such as research and development programs. To clarify any ambiguity regarding applicability to specific or types of programs, an explicit statement was added to the Final Rule at § 205.2, which specifies that Subparts A and B apply to Federal programs in the Catalog of Federal Domestic Assistance (CFDA), pursuant to chapter 61 of title 31, United States Code. Subpart B, § 205.19, specifies that Subpart B applies to Federal programs in the CFDA that are not subject to Subpart A. Chapter 61 of title 31 defines what is and is not considered Federal domestic assistance, and requires the Director of OMB to catalog information on all Federal domestic assistance programs (i.e., it establishes the Catalog of Federal Domestic Assistance). Generally, college and university research and development programs are not considered assistance and are not contained in the CFDA, and therefore are not covered under Subpart A or Subpart B of the Final Rule.

Responses from several States indicated that Federal agencies periodically issue grant awards which do not include a CFDA number. Respondents emphasized the problems created in such situations given the fact that this rule relies on program CFDA numbers for tracking withdrawals and payments, and for calculating interest accruals.

The FMS agrees that CFDA numbers are key to the provisions of this rule. The FMS will seek to ensure that CFDA numbers and other necessary program information are provided to the States. The FMS also will seek to ensure that States are not penalized as a consequence of a Federal agency's failure to provide this information.

*Scope—programs below the threshold/non-State recipients (NPRM Subpart C):* NPRM §§ 205.3 Scope and 205.31 Purpose and Scope [Final Rule Subpart B]. The NPRM provided that all programs that were below a State's dollar threshold for classification as a major Federal assistance program or were otherwise not covered in a Treasury-State Agreement would be subject to NPRM Subpart C. In the Final Rule, the provisions applying to State programs covered by NPRM Subpart C are contained at (new) 31 CFR Part 205 Subpart B.

NPRM Subpart C also applied to programs administered by non-State recipients and non-State subrecipients. In the Final Rule, Subpart C has been

reserved for such programs pending further consideration.

In addition to being reformatted in a new section, the provisions applying to States in Subpart B of the Final Rule have been substantively altered in only one aspect—accountability for interest. Under the NPRM, § 205.33(e), interest earned on Federal funds transferred to States covered by Subpart C would be treated in accordance with the administrative requirements specified under the appropriate OMB Circulars. In general this meant that actual interest earned less an allowance for administrative expenses would have to be remitted to the Federal Government.

The Final Rule revises this policy as it applies to States. A State is not to be held accountable for interest earned on programs that are under the threshold, or that are not otherwise covered by a Treasury-State Agreement. However, if it is found that the State is in repeated or egregious non-compliance with the requirement to minimize the time elapsing between the transfer of funds from the Treasury and disbursement of such funds for program purposes, then the program may become subject to the provisions of Subpart A and be brought into the Treasury-State Agreement. Likewise, if the Federal Government is egregious or repeatedly late in transferring funds to States, then the program may become subject to the provisions of Subpart A and be brought into the Treasury-State Agreement. This ensures that a State can earn interest on all programs where the Federal Government is late in transferring funds to the State. NPRM § 205.3(c), which allowed for the coverage of additional programs under Subpart A upon the mutual agreement of a State and the FMS, is retained in the Final Rule at § 205.4(d).

**Payment schedule technique:** NPRM § 205.4. Several States suggested that NPRM § 205.4 should be modified to include an additional funding technique—payment schedules, in which specific times or intervals (i.e., bi-monthly, monthly, etc.) for the transfer of funds would be negotiated in the Treasury-State Agreements. Adherence to the schedule would preclude an interest liability for the State or the Federal Government. The comments suggested that such a technique would provide a less administratively burdensome means for funding block and formula grants which often cover many separate programs.

The FMS recognizes the potential problems arising from certain block and formula grants, but believes that including such a payment schedule technique in a list of funding techniques

would be inappropriate. A payment schedule technique as described in the comments would be designed to lessen administrative burden, but also may undermine CMIA provisions directing all parties to minimize the time between the transfer of Federal funds to a State and the pay out of funds for program purposes. The FMS policy is that such arrangements may be appropriate under some circumstances. The payment schedule technique may be agreed to in the Treasury-State Agreement, if specific conditions warrant its application. Generally, the payment schedule technique will be acceptable under block grant programs which have fixed annual awards and no matching requirement.

**Funding of indirect costs and administrative cost grants:** NPRM § 205.4(f) Funding of indirect costs/administrative expenses [Final Rule § 205.10 Funding of indirect costs and administrative cost grants]. Twenty-eight comments were received addressing the indirect costs/administrative expenses provisions of the NPRM. A number of commenters expressed support for the funding conventions described for indirect costs and administrative expenses. Essentially all of the conventions contained within the NPRM have been retained in the Final Rule, although a new section (§ 205.10) is devoted solely to transfers of funds for such costs. Several commenters questioned what the provisions of this section applied to and what was meant by the term "indirect costs/administrative expenses." The section has been modified to make clear that it applies to all indirect costs and to administrative cost grants. "Administrative cost grant" is defined in the Final Rule at § 205.3.

The majority of comments submitted on NPRM § 205.4(f) requested clarification on the applicability of the several conventions listed. Essentially, a State may apply one of the approved funding techniques and exchange interest (if relevant under the funding technique), or apply one of several specified conventions to ease the administrative burden that would otherwise be associated with tracking and calculating interest for such costs. Specific needs relating to the funding conventions may be detailed in the individual Treasury-State Agreements.

**3-Day rule under pre-issuance funding:** NPRM § 205.5(b)(4) Pre-issuance funding [Final Rule § 205.6(c) Pre-issuance funding and § 205.7(c)(4) Pre-issuance funding]. Eighteen commenters recommended revising the provision limiting a State's ability to request funds under the pre-issuance

funding technique to 3 business days prior to the date on which it issues checks, warrants, or payments by other means. It was suggested that the 3 day request period should be incorporated as a goal rather than a requirement, and that States should not have to justify to, or obtain approval from, the FMS in order to request funds earlier than 3 business days prior to issuing checks, warrants, or payments by other means. The FMS believes that establishing 3 business days as the standard for requesting funds under the pre-issuance funding technique is a sound cash management policy for the following reasons: (1) CMIA requires that the time elapsing between the transfer of funds from the Treasury and the issuance or redemption of checks, warrants, or payments by other means must be minimized; (2) The practice ensures that funds will be provided to States at least 2 business days prior to the date needed for satisfying constitutional or statutory requirements that funds be in State accounts prior to the issuance of a check, warrant, or payment by other means. (If it is not practicable for a State to meet its legal requirements by requesting Federal funds 3 business days prior to issuance, and receiving them at least 2 business days prior to issuance, then the State may provide justification as to why it requires funds on hand for a longer period, which the FMS will consider when negotiating the Treasury-State Agreement); and (3) Providing justification for holding Federal cash balances in excess of 3 days is an existing standard used by Federal agencies in interpreting the Treasury Department's requirements under current 31 CFR Part 205 to advance only enough cash to meet actual, immediate cash needs.

**Default provisions for a State without an Agreement:** NPRM § 205.6(i) Default procedures for States without Agreements [Final Rule § 205.9(f) Default procedures for a State without a Treasury-State Agreement after the Onset Period]. A number of comments were received which indicated that the funding procedures required under the default provisions would not be feasible. The Final Rule provides that, consistent with Federal and State law, the FMS will prescribe the funds transfer procedures for a State that does not enter into a Treasury-State Agreement. In order to provide more flexibility in considering factors unique to a particular State, the FMS will only prescribe techniques which are administratively feasible for a State.

**Federal agency responsibilities—reverse flow programs:** NPRM § 205.7(j))

[Final Rule § 205.15(e) Reverse flow programs]. Several States commented that § 205.7(j) of the NPRM, which required Federal agencies to submit interest calculations to States no later than December 31, was inconsistent with NPRM § 205.13, which required States to submit Annual Reports including Federal agency information on that same date. The States commented that the inconsistency would necessarily cause the States to miss the December 31 deadline.

The FMS recognizes the inconsistency in the NPRM provisions, and the Final Rule requires Federal agencies to provide States with interest calculations at least one month prior to the deadline for States to submit their Annual Reports.

*State responsibilities—documenting reimbursable costs:* NPRM § 205.8(l) [Final Rule § 205.14(b)(3) Documentation]. Several States commented about NPRM § 205.8(l), which required States to maintain "separate, formal accounting records for direct costs." Commenters requested that the language be changed to define more clearly the FMS's position. All comments reflected a concern that a literal interpretation of the NPRM language would result in an onerous and unnecessary burden on the States.

The FMS has changed the language to clarify that a State is not required to develop new systems for tracking direct costs. States are required to maintain documentation to substantiate claims for direct costs. This means that States must retain records which support direct cost claims in a manner which facilitates the audit and review of such figures pursuant to § 205.17.

*State responsibilities—record retention:* NPRM § 205.8(n) [Final Rule § 205.17(d) Record retention]. Several comments suggested that the 5-year record retention requirement of NPRM § 205.8(n) was too long and would impose an unnecessary cost and burden upon the States. It was suggested that the retention period should be 3 years to be consistent with existing Federal standards. This recommendation has been incorporated into the Final Rule.

*State responsibilities—transfers to non-State subrecipients:* NPRM § 205.8(r) [Final Rule Subpart C (reserved)]. Several States commented on this section, interpreting it as requiring States to enter into Treasury-State type agreements with each non-State subrecipient to which they transfer Federal funds. The FMS does not expect States to enter into separate agreements with each subrecipient, but does expect States and subrecipients to work together to develop procedures which

will ensure the efficient and effective transfer of Federal funds. The Final Rule does not contain specific provisions addressing non-State subrecipients at this time. In this Final Rule, Subpart C has been reserved for regulations governing the transfer of Federal funds to non-State recipients and non-State subrecipients (see discussion under "Scope—programs below the threshold/non-State recipients"). Nevertheless, as envisioned by the State/Federal Cash Management Reform Task Force (Task Force), States are expected to administer subgrants along the same principles as grants from the Federal Government to the States and to time the transfer of funds to subrecipients, to the maximum extent practicable, with the subrecipients' actual, immediate funds requirements in carrying out the program or project.

*Federal interest liabilities—general provision:* NPRM § 205.9(a) General [Final Rule § 205.11(a) General]. Thirteen comments related to NPRM § 205.09(a) were received. The primary concern was the NPRM language providing that "a State shall be entitled to interest from the Federal Government if it pays out its own funds for program purposes with valid authorization, appropriation, and obligational authority . . ." States are concerned that such language will limit the amount of interest States can earn.

The language of the Final Rule specifies that the Federal Government will incur an interest liability to a State if the State pays out its own funds for program purposes with valid obligational authority under Federal law, Federal regulation, or Federal-State agreement. This language is based directly on language contained in the House of Representatives Committee Report on CMLA (House Report), which specifies that a State could claim interest costs only if it advanced its funds to pay an obligation which is recognized as valid under Federal law, Federal regulation, or Federal-State agreement. Thus, a State is generally entitled to interest if it advances its own funds in accordance with agreed upon funding techniques for an expenditure which the Federal Government is obligated to pay, or if the obligation of Federal funds comes subsequent to the State's expenditure but permits payment for the expenditure.

NPRM paragraph (e) Exhausted appropriations under appropriated entitlements has been deleted in this Final Rule because of concerns expressed by Federal agencies that it may be misconstrued as changing capped entitlements into open-ended entitlements. This ramification was not

intended, and this paragraph has been deleted in deference to the concerns expressed.

Because the Federal Government will incur an interest liability even in cases where a State pays out its own funds prior to the obligation of Federal funds, Federal agencies are expected to work to ensure the availability of funds and to rectify the systemic breakdowns in the funding process. Federal agencies must submit apportionment requests to OMB on a timely basis and must review grant applications and project plans promptly. Federal agencies are also responsible for executing grant awards to States on a timely basis to preclude Federal interest liabilities.

The Final Rule also clarifies that if a State pays out its own funds for program purposes without obligational authority, the Federal Government will incur an interest liability if the lack of obligational authority is not the result of limitation, reduction, or termination of the program and where obligational authority is subsequently established to permit payment for the State's expenditures. States are expected to be cautious in advancing their funds in situations where appropriations for ongoing programs may be exhausted and should avoid such advances when it is the intent of Congress to limit, reduce, or terminate funding, in contrast to delays in providing appropriations.

*Failure to request funds:* NPRM § 205.9(a)(1) Failure to request funds [Final Rule § 205.17(1) Failure to request funds]. Seventeen comments were received addressing NPRM § 205.9(a)(1). This subsection specified that if a State fails to request funds in accordance with the procedures established for its funding techniques, it would not be entitled to interest for any period prior to the date that a Federal agency received the request for funds. The majority of comments suggested that a State should be entitled to interest from the day it advances its own funds unless it egregiously or repeatedly fails to request funds in accordance with agreed upon or default techniques. Although States and Federal agencies are expected to comply with procedures specified for each funding technique to the fullest extent practicable, a State will be entitled to interest except in cases of deliberate or repeated failure to request funds in accordance with agreed upon or default procedures. This policy acknowledges that States unintentionally may make minor errors in amounts requested or unknowingly fail to request funds in accordance with agreed upon or default funding techniques. A single instance of a

decision to circumvent agreed upon or default techniques for requesting funds may constitute deliberate failure if it involves a large dollar amount of Federal funds. This provision is located § 205.17(a) of the Final Rule.

**Reimbursable programs:** [Final Rule § 205.6(e) *Reimbursable funding*, § 205.7(f) *Prohibition of reimbursable funding*, § 205.9(b)(2)(iii)]. Thirty-six comments were received addressing the provisions that apply to reimbursable funding programs. The majority of comments stated that there should be no distinction between mandated reimbursable programs and others, and that a State should be entitled to interest whenever it advances its own funds. Several commenters suggested that States should be allowed to select reimbursable funding, where conditions warrant, and be subject to the same interest provisions as under mandatory reimbursable programs. Under this Final Rule, reimbursable funding is not generally available for selection by a State, but may be allowed in specific circumstances.

A major provision of CMIA is that the head of each Federal executive agency and each State "shall minimize the time elapsing between the transfer of funds from the United States Treasury and the issuance or redemption of checks, warrants, or payments by other means for program purposes." This provision applies whether the disbursement of funds from the Treasury occurs prior to or after the issuance or redemption of State payments. If States were, as a matter of administrative practice, to advance funds and subsequently request reimbursement while earning interest over the entire period, the major incentive to comply with the aforementioned provision of CMIA is removed. Thus, reimbursable funding is not generally available for selection by a State.

Additionally, the Task Force did not envision reimbursable funding as a valid technique, except where required by statute. This is documented in the general principles developed by the Task Force and contained in the 1983 Memorandum of Understanding (MOU) entered into by the Federal and State members of the Task Force. Principle 6 from the MOU presents three funding techniques "that shall be available for selection by a State," none of which is reimbursable funding. This Final Rule incorporates the three techniques developed by the Task Force, and allows a fourth, average clearance, which is merely a modification of one of the three funding techniques. Also, MOU principle 14 states: "Where Federal

statutes require reimbursement, the Federal Government will revise regulations or administrative procedures to ensure that cash is transferred as closely as possible to the time that States make disbursements." So not only did the Task Force intend to limit reimbursable funding solely to instances where required by statute, but also it anticipated that the Federal Government should revise regulations and administrative procedures to protect States from having Federal agencies require reimbursable funding except where expressly required by Federal law.

Nevertheless, the FMS recognizes that some States have long used reimbursable funding as a matter of administrative practice for reasons of internal control and administrative ease. Accordingly, the Final Rule allows States to continue using reimbursable funding on an interim basis with those programs for which it was used prior to October 24, 1992, excepting the 19 programs listed in § 204.4(a).

In short, this regulation: (1) Allows a State to continue using reimbursable funding for an interim period with those programs for which it was used prior to October 24, 1992, excepting the programs listed in § 205.4(a); (2) prohibits Federal agencies from requiring a State to use reimbursable funding; (3) provides that the Federal Government will incur an interest liability to a State if a Federal agency requires a State to use reimbursable funding contrary to these regulations, or if a State continues to use reimbursable funding for a program for which reimbursable funding was used prior to October 24, 1992; and (4) specifies that reimbursable funding will be prohibited after June 30, 1994. During this period, the FMS will evaluate the use of reimbursable funding by States. If it is determined that reimbursable funding is an appropriate and equitable technique, the FMS will authorize its continued use through rulemaking.

Several commenters have requested that a list of all programs for which Federal law requires reimbursable funding to States be included in the Final Rule. At this time no programs have been identified where Federal law requires a State to pay out its own funds before it may request and receive Federal funds.

**Federal Highway Trust Fund programs:** NPRM § 205.9(a)(4) *Federal-aid highway programs* [Final Rule § 205.11(d) *Federal Highway Trust Fund*]. Forty-nine commenters addressed the supplemental language and regulation policy regarding Federal-

aid highway programs. The Department of Transportation suggested that the phrase "Federal-aid highway programs" be replaced with "Federal Highway Trust Fund programs." This suggestion was offered, and incorporated, because the Intermodal Transportation Efficiency Act of 1991 allows the States more flexibility in using such funds, i.e., they may be used for highway, transit or other transportation related purposes.

The large majority of the commenters perceived the policy of limiting a State's ability to accrue interest until the date that the Federal Highway Administration (FHWA) receives a request for funds to be inequitable to the States and/or contrary to the intent or language of CMIA and its legislative history. The Final Rule amends this policy and specifies, at § 205.11(d), that a State will be entitled to interest from the time it advances its own funds provided that it requests funds for current project costs at least weekly. This amended policy allows the 35 States that are currently billing on a weekly or more frequent cycle to earn interest if they expend funds prior to submitting a request. Commensurate with the purpose of CMIA, the policy also promotes efficiency and effectiveness in the transfer of Federal funds by providing an incentive for all States to bill the FHWA at least weekly. Fifteen commenters suggested that interest be allowed to accrue prior to the submittal of a bill, at least for a limited time period (such as 7 days). Several commenters noted language from the Senate Report to the 1988 version of CMIA (which was not enacted into law) as support for a State's entitlement to earn interest prior to submitting a bill. The weekly billing policy of CMIA is consistent with the language of the Senate Report which specifies that a State will be entitled to calculate interest due to it from the Federal Government, including interest for that period after State funds have been used but prior to submission of a formal request, provided that amounts requested are related to projects that have been approved, authorized, and placed under agreement, and that "the State is submitting reimbursement billings on a timely basis."

Although States are allowed to earn interest if they advance funds prior to submitting a request under Federal Highway Trust Fund programs, the FMS will strongly encourage selection of one of the funding techniques indicated in § 205.6 in order to minimize the time between the transfer of funds from the Treasury and payment for program purposes. As noted in the NPRM,

because States are authorized to bill on an accrual basis, they are not required to advance funds under FHWA programs, and more importantly can apply any of the approved funding techniques. Using one of the funding techniques as described in Final Rule § 205.6 maintains the intent of Task Force principle 6, which specifies that 3 techniques will be made available for selection by a State: Checks paid (zero balance accounting), estimated checks cleared (estimated clearance and its variation average clearance), and checks issued (pre-issuance funding).

Eleven commenters suggested that interest should accrue from the time a State advances its own funds prior to submitting a bill, but that such amounts of interest be available for offset only against either: (1) interest foregone on accrued unbilled costs, or (2) interest owed to the Federal Government under Federal-aid highway programs. The Final Rule does not incorporate such suggestions because timely billing and reimbursement are paramount to achieving efficiency, effectiveness, and equity in Federal funds transfers. CMIA requires the head of an executive agency and the State to "minimize the time elapsing between transfer of funds from the United States Treasury and the issuance or redemption of checks, warrants, or payments by other means for program purposes," which applies whether such issuance or redemption occurs prior to, or subsequent to, the transfer of funds from the Treasury. The weekly billing cycle provision minimizes such time while taking into account the unique nature of the Federal Highway Trust Fund programs and allowing interest to accrue prior to the submission of a bill.

The suggestion to allow States to offset interest owed the Federal Government with interest foregone on accrued unbilled cost was not accepted because it would entitle a State to earn interest on accrued unbilled costs. Accrued unbilled costs are costs in excess or otherwise outside of approved cost estimates and/or project agreements between a State and the FHWA. The House Report clearly indicates that States are not entitled to earn interest on such accrued unbilled costs, as they are not obligations of the Federal Government:

[A] State could claim interest costs only if it advanced its funds to pay an obligation which is recognized as valid under Federal law, Federal regulation or Federal/State agreement. . . . or, with respect to programs such as those funded by the Federal Highway Administration, a State could collect

interest if it advanced funds to meet programs obligations, which were incurred with valid obligational or contractual authority.

To clarify this point a specific provision addressing the issue was inserted into the Final Rule at § 205.11(d)(2).

Eleven commenters suggested that the Federal Highway Trust Fund be exempted from the interest provisions of CMIA. It is clearly the intent of CMIA to cover the Federal Highway Trust Fund, as evidenced by specific references in the legislative history.

**Refunds:** NPRM § 205.10(b) *Refunds* [Final Rule § 205.12(b) *Refunds*].

Twenty-two comments were received addressing the treatment of refunds. Ten of these comments requested that some threshold of materiality, as existed in the July 22, 1991, pre-clearance draft, be reinstated. Suggested dollar amounts for a threshold ranged from \$1,000 to \$100,000. In order to lessen the administrative burden that would otherwise ensue if States were required to track and calculate interest on every refund, a threshold of materiality in the amount of \$10,000 has been included in the Final Rule, below which neither States nor Federal agencies are required to track and calculate interest on an individual refund transaction. A State may choose a lower threshold or no threshold if it determines that doing so is less burdensome. The term "refund transaction" means when the State's bank account is credited with all repayments that have accumulated under a given program. If, under a given program, the total dollar amount of the refund transaction is less than \$10,000, then no interest liability accrues; if the amount credited to the State's bank account is greater than, or equal to, \$10,000 then interest accrues from the date that the State's bank account is credited with the deposit until the date that the funds are offset against other payments or are credited to an account of the Federal Government. If a State is found to be holding back or grouping the deposit of repayments so as to avoid reaching the threshold of \$10,000, then the State will be considered to be in non-compliance, and the remedial actions listed under § 205.17(k) will be initiated.

**Disallowances:** NPRM § 205.10(c)

*Disallowances.* Fifty-nine comments addressing disallowances were received. The FMS has reassessed the provision covering disallowances (referring to incurred costs which are questioned by an audit organization and agreed to by the appropriate Federal agency as costs which should not be

charged to the Federal Government) and has determined that disallowances are not covered by CMIA, but are covered by existing program, audit, and debt collection requirements. Accordingly, the provisions relating to disallowances have been removed from the Final Rule. Disallowances will continue to be handled by Federal agencies as a compliance issue relating to program administration.

**Direct cost of implementation:** NPRM § 205.12(a) Definition [Final Rule § 205.14 Direct costs of implementation]. Thirteen suggestions to revise the provisions defining what would be considered a direct cost of implementing CMIA were received. As stated in the NPRM, the regulation followed the guidance contained in the House Report which notes that the statute is a compromise between the views of Federal and State officials. A number of the comments suggested that types of costs that were explicitly refuted in the compromise should be eligible in the Final Rule. For example, it was recommended that such costs as developing and negotiating the Treasury-State Agreements and training employees should be eligible for reimbursement by the FMS. The House Report states that costs attributable to CMIA fall into two broad categories: "The first, are costs which should be reimbursed under current OMB guidelines for obtaining reimbursement for indirect program costs (OMB Circular A-87). The second are costs associated with computing the interest payments which should be considered by the Secretary in determining amounts of interest due to/from the State." Moreover, the Report specifically states that "most of the costs associated with H.R. 4279 are already eligible for reimbursement under the OMB Circular A-87; for example, developing and implementing the cash management policies and procedures, negotiating the agreement, and training State employees on how to implement the new procedures." Congress was clear in its intent, as documented in the House Report, that only those costs directly related to the interest calculations required by CMIA would be eligible for reimbursement through an offset of interest. The Final Rule, therefore, reflects that such costs consist of those associated with developing and maintaining clearance patterns and for performing the actual calculation of interest. Costs incurred in compiling and analyzing data related to interest calculation and in preparing and transmitting the Annual Report to the



FMS would be eligible for reimbursement.

Addressing NPRM § 205.12(a)(1), several commenters stated that it will be nearly impossible to budget accurately to forecast implementation costs for the first several years of implementation. The Final Rule acknowledges this and removes such requirement. In addition several commenters suggested that the costs should not have to be clearly described in the Treasury-State Agreement. However, this comment is directly contradicted by the legislative intent as documented in the House Report which states that the Treasury-State Agreement would clearly describe what costs would be considered.

Several commenters disagreed with § 205.12(a)(2) of the NPRM, which states that direct costs do not include expenses for upgrading or modernizing of accounting systems. This provision is intended to ensure that a State does not claim an accounting system overhaul under the cost reimbursement provisions of CMIA. This provision does not preclude a State from receiving cost reimbursement for systems programming or computer time. In accordance with the legislative intent as documented in the House Report, such costs should be relatively minor and clearly described in the Treasury-State Agreement.

NPRM 205.12(b) Reimbursement of direct costs [Final Rule § 205.14(b)(4) Eligibility of costs]. The NPRM provided that direct costs in excess of \$30,000 in any year will not be eligible for reimbursement unless a State can justify that without such costs it would be unable to develop clearance patterns or calculate interest. Approximately 35 comments were received addressing the \$30,000 figure with the majority calling for its elimination, indicating that it is neither reasonable nor in accord with CMIA and its legislative history. The FMS is raising this figure to \$50,000 in light of the comments received. This \$50,000 figure does not cap the amount of reasonable direct costs for which a State may be compensated. CMIA requires the FMS to consider all direct costs incurred by a State for interest calculations, and the Final Rule is consistent with CMIA. The \$50,000 figure merely constitutes the point at which the burden of justifying and establishing the reasonableness of those eligible direct costs shifts. For those eligible direct costs under \$50,000, the FMS will review those costs under the presumption that such costs are reasonable. For those eligible direct costs claims of \$50,000 or more, a State

will have the burden of establishing and justifying to the FMS the reasonableness of such costs.

*Direct cost offset:* NPRM 205.12(b)(7) [Final Rule § 205.14(b)(8) Payment by the FMS]. Several commenters requested clarification of how, and why, the FMS will score each State's direct costs against the total interest owed by all the States. The reason for scoring and offsetting interest and direct costs at the aggregate level is to ensure that each State will receive its total reimbursable direct costs. There is a permanent indefinite appropriation embodied within CMIA for the payment of interest; however, there is no appropriation for the direct payment of costs incurred by the State. The legislative history makes it clear that States are to receive reimbursement for the allowable direct costs of implementation through an offset against interest owed to the Federal Government. However, if this were done on a State-by-State basis, any State whose reimbursable costs are greater than its interest liability to the Federal Government would not be able to receive full reimbursement. In brief, to alleviate the problem, each State's total interest liability will be aggregated to create a pool against which all direct cost claims will be offset. By pooling each State's interest liability and offsetting costs at an aggregate level, the FMS enables a State that otherwise would have a total interest liability insufficient to cover all of its costs to recoup such costs from the pool of total liabilities. It is anticipated that the total of all States' interest liabilities will be greater than the total of all States' reimbursable direct costs.

*Annual Reports:* NPRM § 205.13 Annual Reports [Final Rule § 205.15 Annual Reports]. Twenty comments addressing the Annual Reports section were received. Six commenters felt that the numerous breakdowns required in the NPRM were unnecessary and/or burdensome. The reporting requirements were carried over from the July 22, 1991, pre-clearance draft which provided for direct costs being offset on a State-by-State basis. If direct costs were offset on an individual State basis, all of the reporting breakdowns would be necessary to determine whether a State would receive full reimbursement for its direct costs. Since the Final Rule provides for direct cost offset on an aggregate level, ensuring that each State will receive full reimbursement, as long as the total of all States' interest liabilities exceed the total of all States' reimbursable direct costs, there is no need for many of the breakdowns. The

Final Rule eliminates any distinction between trust fund programs and non-trust fund programs (except with regard to the State's account in the Unemployment Trust Fund (UTF)) in the Annual Report, and substantially reduces the minimum reporting requirements.

Several commenters requested that a list of all trust funds be published in the Final Rule. Because the Final Rule removes the requirement to identify separately interest for trust fund programs (except for the State's account in the UTF), a list of trust funds is not relevant, and has not been included. The FMS will match the individual programs to the appropriate trust fund to remove this burden from the States.

Three commenters questioned the requirement that interest be reported on a program specific basis. It is necessary for interest to be calculated on a program specific basis in order to monitor and ensure the successful implementation of CMIA. If interest is not specified on a program basis it will be impossible for both the States and Federal agencies to determine, and work toward eliminating, the specific factors causing the accrual of interest. It will also make it impossible for the FMS to carry out its duties and collect a charge for noncompliance from a Federal agency that egregiously or repeatedly fails to comply with the requirements of this Final Rule.

Several commenters stated that the annual reporting and exchange of interest should be tied to the end of a State's fiscal year, rather than a fixed date. However, in order for interest liabilities to be aggregated among all States for offset against direct costs, all interest must be exchanged on the same day (see discussion under direct cost offset).

*The Unemployment Trust Fund and programs:* NPRM Subpart B [Final Rule § 205.13(i) Funds withdrawn from a State account in the Unemployment Trust Fund (UTF)]. In the NPRM, an entire subpart (Subpart B, The Unemployment Trust Fund) was devoted to the UTF. Numerous comments were received on the various provisions of this Subpart. Because the large majority of its content in the NPRM was either repetitive of the provisions of Subpart A, or applied to general UTF cash management issues rather than direct CMIA issues, the NPRM Subpart B has been deleted from the Final Rule.

The Department of Labor (DOL) will issue regulations and/or other directives covering all unemployment fund cash management issues and operations.

Those regulations will specifically include issues formerly contained in Subpart B of the NPRM, and will include standards and policy for immediate deposit requirements contained in the Social Security Act (SSA) § 303(a)(4) and the Federal Unemployment Tax Act (FUTA) § 3304(a)(3) and the limited withdrawal requirements in SSA § 303(a)(5) and FUTA § 3304(a)(4). Those regulations and/or other directives will be compatible with CMIA and these regulations. The Secretary of Labor will retain full authority to administer the provisions of §§ 303(a)(4) and 303(a)(5) of the SAA and §§ 3304(a)(3) and 3304(a)(4) of the FUTA and to monitor State conformity and compliance with the requirements therein. However, the withdrawal requirements of the SSA and the FUTA are affected by CMIA. Section 5(b) of CMIA, 31 U.S.C. 6503(c)(3)(B), addresses the special treatment of interest computation and exchange for funds drawn from State accounts in the UTF. States are permitted to use earnings generated to pay "related banking costs" for maintaining those accounts, and return interest earnings in excess of "related banking costs" to the UTF annually.

The specific provisions implementing § 6503(c)(3)(B) of CMIA (amounts of interest paid by a State, on funds withdrawn from its account in the UTF, will consist of actual interest earnings less related banking costs) are contained in § 205.13(i) of the Final Rule. Many commenters recommended that the provision that actual interest earned less related bank costs should be applied to the clearing account as well as funds withdrawn from the Federal Employees Compensation Account (FECA) and the Extended Unemployment Compensation Account (EUCA). CMIA is explicit that such provision applies only to funds withdrawn from the State's account in the UTF. The FMS does not have the authority to change administratively such provision, so the Final Rule retains its limited applicability only to funds withdrawn from the State's account in the UTF. The interest provisions applicable to any other State program covered by CMIA (including calculation of interest at the 13-week T-Bill rate) apply to funds withdrawn from the FECA and EUCA accounts. The clearing account is not covered by CMIA because CMIA generally applies to payments for program purposes, whereas the clearing account serves as a depository and holding account for unemployment funds prior to transfer to the UTF. Applicable regulations

regarding the timing of transfers from the clearing account to the UTF are encompassed in DOL regulations and program directives.

A number of commenters interpreted the language requiring separate tracking, reporting, and recordkeeping by source of funds in the UTF as being overly burdensome. For purposes of CMIA, the Final Rule requires that the funds withdrawn from the State's account in the UTF must be allocated a pro rata share of interest earnings and related bank costs of the benefit payment account or relevant investment pools. Specifications relating to separate tracking, accounting, recordkeeping, etc., are deferred to DOL requirements.

Several commenters suggested that the provisions requiring an annual exchange of interest are inapplicable to interest on funds drawn down from the UTF, because such interest is to be immediately remitted to the Federal Government under the immediate deposit requirements of both the SSA and the FUTA. The annual remittance of interest on funds drawn down from the UTF is specifically required by CMIA but does not otherwise impact the immediate deposit requirements of SSA/FUTA.

#### OMB Circulars

The OMB Circulars referenced in this regulation may be obtained from the Office of Management and Budget, New Executive Office Building, 725-17th Street, NW., Washington, DC 20503.

#### Regulatory Analysis

It has been determined that this document is not a major regulation as defined in Executive Order 12291 and a regulatory impact analysis is not required. Although some States may have to make interest payments to the Federal Government for the use of Federal funds, such costs will be a direct result of implementation of CMIA.

#### Regulatory Flexibility Act

It is hereby certified that this regulation will not have a significant economic impact on a substantial number of small entities. Accordingly, a regulatory flexibility analysis is not required. States do not fit within the Regulatory Flexibility Act definition of "small entity," 5 U.S.C. 601.

#### Paperwork Reduction Act

The collection of information contained in this final regulation has been reviewed and approved by OMB in accordance with the requirements of the Paperwork Reduction Act (44 U.S.C. 3504(h)) under control number 1510-0061. The estimated annual burden per

respondent/recordkeeper varies from 250 to 750 hours, depending on individual circumstances, with an estimated average of 500 hours.

Five comments were received addressing the estimated annual burden of 250 hours to 750 hours per respondent/recordkeeper contained in the NPRM. One commenter stated that it is unreasonable to use the Paperwork Reduction Act estimate as a guideline in calculating a State's direct costs of implementing CMIA. The FMS agrees that the Paperwork Reduction Act estimate may not be the only basis for calculating a State's direct costs. The estimated recordkeeping and reporting burden may represent only a portion of the costs that will be recovered by the States. In addition, some of the reporting/recordkeeping costs presumably will be recoverable under OMB Circular A-87 rather than as a direct cost recovery under CMIA.

Several of the comments also indicated that the reporting and/or recordkeeping estimate appears to be low. The FMS emphasizes that the estimate applies solely to hours involved in recordkeeping and reporting. In addition, none of the comments received provided a basis for adjusting the estimate, nor offered a reasonable alternative. The FMS has not amended the estimate, and maintains that 250 to 750 hours per respondent is the most reasonable estimate available given the recordkeeping and annual reporting requirements under CMIA and this Final Rule. However, in response to State comments some of the recordkeeping and reporting requirements have been simplified in the Final Rule. Such changes which simplify the reporting and recordkeeping burden are as follows: (1) There is a de minimis rule applicable to refunds; (2) The requirement to calculate interest for disallowed payments has been removed; (3) The requirement to report separately interest by trust fund has been removed; and (4) The requirement to retain records for 5 years has been reduced to 3 years.

Additional comments concerning the accuracy of this burden estimate and suggestions for reducing this burden should be directed to the Financial Management Service, Facilities Management Division, Property and Supply Section, 3361-L 75th Avenue, Landover, MD 20785; and to the Office of Management and Budget, Paperwork Reduction Project (1510-0061), Washington, DC, 20503. THIS ADDRESS SHOULD BE USED ONLY FOR COMMENTS AND/OR SUGGESTIONS CONCERNING THE AMOUNT OF



## TIME SPENT TO COLLECT THIS DATA.

### List of Subjects in 31 CFR Part 205

Grant programs, Grant administration, Intergovernmental relations, Electronic funds transfers.

### Authority and Issuance

For the reasons set forth in the preamble, 31 CFR Part 205 is revised to read as follows. Subpart C is reserved.

## PART 205—RULES AND PROCEDURES FOR FUNDS TRANSFERS

### Sec.

205.1 Purpose.

205.2 Scope of Part.

205.3 Definitions.

### Subpart A—Negotiation of Intergovernmental Agreements for Financing Federal Assistance Programs—Interest Liabilities on Intergovernmental Funds Transfers

205.4 Scope of Subpart.

205.5 Onset Period.

205.6 Funding techniques.

205.7 Requesting and transferring funds.

205.8 Clearance patterns.

205.9 Treasury-State Agreements.

205.10 Funding of indirect costs and administrative cost grants.

205.11 Federal interest liabilities.

205.12 State interest liabilities.

205.13 Interest calculation.

205.14 Direct costs of implementation.

205.15 Annual Reports.

205.16 Interest payment.

205.17 Compliance and oversight.

205.18 Appeals and dispute resolution.

### Appendix A to Subpart A of Part 205—Definition of Major Federal Assistance Program

### Subpart B—Potential Liabilities on Intergovernmental Funds Transfers Included in the Catalog of Federal Domestic Assistance but Otherwise Generally Excluded from Subpart A

205.19 Scope of Subpart.

205.20 Cash advances.

205.21 Federal agency oversight responsibilities.

205.22 State noncompliance.

205.23 Failure to make funds available.

### Subpart C—[Reserved]

Authority: 5 U.S.C. 301; 31 U.S.C. 321, 3335, 6501, 6503.

### § 205.1 Purpose.

Subparts A and B of this part implement the Cash Management Improvement Act and prescribe rules and procedures for the transfer of funds between the Federal Government and the States for Federal grant and other programs. Subpart C of this part is reserved and, if issued, may implement other authorities and govern transactions outside the scope of Subparts A and B.

### § 205.2 Scope of part.

(a) Subparts A and B apply to programs listed in the Catalog of Federal Domestic Assistance, pursuant to chapter 61 of title 31, United States Code.

(b) This part does not generally apply to direct loan programs.

(c) This part does not apply to payments made to States acting as vendors on Federal contracts, which are subject to the Prompt Payment Act of 1982, as amended, 31 U.S.C. 3901 *et seq.*, Office of Management and Budget (OMB) Circular A-125 "Prompt Payment," and 48 CFR Part 32.

(d) This part does not apply to the Tennessee Valley Authority (TVA) or programs administered by the TVA.

### § 205.3 Definitions.

For the purpose of this part:

*Administrative cost grant* means a grant exclusively for administrative expenses under a program with separate grant awards for benefit payments and administrative expenses.

*Auditable* means the sources of data and information for a calculation are readily available, fully documented, and verifiable, such that the calculation can be replicated and proven to comply with all pertinent standards.

*Authorized State official* means a person with the authority under the laws of a State to make commitments on behalf of the State for the purposes of this regulation, or that person's official designee as certified in writing.

*Check* means a negotiable demand draft or warrant.

*Clearance pattern* means a frequency distribution showing the proportion of a total amount disbursed that is debited against the payer's bank account each day after the disbursement.

*Current project cost* means a cost for which the liability has been recorded on or after the day on which a State last requested funds for the project.

*Day* means a calendar day unless otherwise specified.

*Disburse* means to issue a check or initiate an electronic funds transfer payment.

*Discretionary grant project* means a project for which a Federal agency is statutorily authorized to exercise judgment in awarding a grant and in selecting a grantee, generally through a competitive process.

*Drawdown* means a process whereby a State requests and receives Federal funds.

*Electronic funds transfer (EFT)* means, in the context of Federal payments to States, the delivery of funds through wire transfer or the Automated Clearing House.

*Equivalent rate* means auction average equivalent yield, also known as the auction average investment rate of 13-week Treasury bills.

*Federal agency* means an executive agency as defined by section 102 of title 31, United States Code, exclusive of the TVA.

*Federal-State agreement* means an agreement between a State and a Federal program agency specifying terms and conditions for carrying out a program or group of programs, but does not mean a Treasury-State Agreement described in § 205.9.

*Fiscal year* means, unless otherwise indicated, a State's budget year ending in the specified calendar year.

*Issue checks* means to release or distribute checks to the payees.

*Major Federal assistance program* is defined in appendix A to subpart A of this part.

*Obligational authority* means the existence of a definite commitment on the part of the Federal Government to provide appropriated funds to a State to carry out specified programs, whether the commitment is executed before or after a State pays out funds for program purposes. This term means that an obligation to a State has been executed and does not refer to the amount of budgetary resources available.

*Pay out* means to debit the payor's bank account.

*Pay out funds for program purposes* means, in the context of State payments, to debit a State account for the purpose of making a payment to 1) a person or entity that is not considered part of the State pursuant to the definition of "State" in this section, or 2) a State entity for the procurement of goods or services for the direct benefit or use of the payor State entity or the Federal Government.

*Program* means the range of activities encompassed under, and classified by, a Catalog of Federal Domestic Assistance number (CFDA #).

*Refund* means a recovery of funds previously paid out for program purposes.

*Related banking costs* means stand-alone, non-credit services which are considered necessary and/or customary for sustaining an account in a financial institution, whether in commercial financial institutions or State Treasurer accounts. Investment service fees are not related to banking costs.

*Request for funds* means a solicitation for funds that is completed and submitted in accordance with Federal agency guidelines.

*Secretary* means the Secretary of the United States Department of the

Treasury. The Financial Management Service (FMS) is the Secretary's representative in all matters concerning this Part, unless otherwise specified.

*State* means a State of the United States, the District of Columbia, the Commonwealth of Puerto Rico, the Commonwealth of the Northern Mariana Islands, American Samoa, Guam, the Virgin Islands, and an agency, instrumentality, or fiscal agent of a State so defined, but does not mean a local government or an Indian tribal government.

A State agency or instrumentality is any organization or component unit of the State reporting entity as defined by Generally Accepted Accounting Principles.

A fiscal agent of a State is an entity that pays, collects, or holds Federal funds on behalf of the State in furtherance of a Federal program, exclusive of a private nonprofit community organization.

*Trust fund for which the Secretary is the trustee* means a trust fund administered by the Secretary.

#### Subpart A—Negotiation of Intergovernmental Agreements for Financing Federal Assistance Programs—Interest Liabilities on Intergovernmental Funds Transfers

##### § 205.4 Scope of subpart.

(a) *Initial programs.* From October 24, 1992, to the end of a State's 1994 fiscal year, this subpart applies, at a minimum, to the following programs, provided they meet the threshold for major Federal assistance programs in the State:

Alcohol and Drug Abuse and Mental Health Services Block Grant (CFDA 93.992);

Chapter 1 Programs—Local Educational Agencies (CFDA 84.010);

Child Support Enforcement (CFDA 93.023);

Family Support Payments to States (CFDA 93.020);

Foster Care—Title IV-E (CFDA 93.658);

Highway Planning and Construction (CFDA 20.205);

Job Opportunities and Basic Skills Training (CFDA 93.021);

Job Training Partnership Act (CFDA 17.250);

Low-Income Home Energy Assistance (CFDA 93.028);

Medical Assistance Program (CFDA 93.778);

National School Lunch Program (CFDA 10.555);

Nutrition Assistance for Puerto Rico (CFDA 10.566);

Pell Grant Program (CFDA 84.063);

Rehabilitation Services—Basic Support (CFDA 84.126);

Social Services Block Grant (CFDA 93.667);

Special Education—State Grants (CFDA 84.027);

Special Supplemental Food Program for Women, Infants, and Children (CFDA 10.557);

State Administration Matching Grants—Food Stamp Program (CFDA 10.561);

Supplemental Security Income (CFDA 93.807);

Unemployment Insurance (CFDA 17.225);

(b) *Threshold of materiality.* From the beginning of a State's 1995 fiscal year and thereafter, this subpart applies, at a minimum, to all programs that meet the threshold for major Federal assistance programs in a State.

(c) *Determining major Federal assistance programs.* Unless otherwise specified in a Treasury-State Agreement, major Federal assistance programs will be determined from the most recent Single Audit data available from the U.S. Bureau of the Census and, if necessary, other data from the most recent fiscal year for which funding can be documented.

(d) *Covering additional programs.* A State and the FMS may agree, in a Treasury-State Agreement, to cover additional programs under this subpart. However, the FMS has unilateral authority to require a State and Federal agency to cover additional programs under this subpart if a State or a Federal agency fails to comply with Subpart B of this part, as set forth in §§ 205.22 and 205.23.

(e) *Programs not covered by this subpart.* Programs in the Catalog of Federal Domestic Assistance that are not covered by this subpart are subject to Subpart B of this part.

(f) *Grace period for colleges and universities.* Unless otherwise specified in a Treasury-State Agreement, this subpart does not apply to a State institution of higher education prior to a State's 1995 fiscal year, notwithstanding any other provision of this section.

##### § 205.5 Onset Period.

(a) *Definition.* The Onset Period is from October 24, 1992, to the later of June 30, 1993, or the last day of a State's 1993 fiscal year.

(b) *Continuing existing practices.* Notwithstanding any other provision of this subpart and unless otherwise specified in a Treasury-State Agreement, during the Onset Period a State and a Federal agency shall be allowed to continue with the accounting and cash management practices used prior to the Onset Period. A State and a Federal agency shall not be required to implement new funding techniques,

monitor funds for the purpose of calculating interest, or otherwise change the manner in which Federal program funds are requested, transferred, managed, or accounted for prior to the Onset Period.

(c) *Imputing interest liabilities to the Onset Period.* Notwithstanding any other provision of this subpart and unless otherwise specified in a Treasury-State Agreement, a State shall use the interest calculation for its 1994 fiscal year, as well as available data from the Onset Period, to impute retrospectively Federal and State interest liabilities, pro rata, to the Onset Period.

(d) *Initial reports and interest payments.* Notwithstanding any other provision of this subpart and unless otherwise specified in a Treasury-State Agreement, the first Annual Reports and the first payments of interest pursuant to this subpart will consist of interest liabilities incurred during a State's 1994 fiscal year and interest liabilities imputed to the Onset Period.

##### § 205.6 Funding techniques.

(a) *Zero balance accounting.* Zero balance accounting is a method of transferring Federal funds to a State based on the actual amount of funds that are paid out by the State each day after a disbursement. Neither the Federal Government nor a State will incur an interest liability when this funding technique is properly applied.

(b) *Estimated clearance.* Estimated clearance is a method of transferring Federal funds to a State based on the estimated amount of funds that are paid out by the State each day after a disbursement. Neither the Federal Government nor a State will incur an interest liability when this funding technique is properly applied.

*Example:* A State mails \$1 million in checks to benefit recipients under a Federally funded program. The State has developed the following clearance pattern for the program, based on when checks historically have been presented for payment:

Day	Percentage of \$'s paid out
0 (checks mailed)	0
1	0
2	0
3	0
4	40
5	30
6	15
7	10
8	5

On Day 3, the State requests 40 percent of the funds disbursed, or \$400,000, and the Federal agency deposits funds in the State account on Day 4 to coincide with the expected presentment of 40 percent of the total disbursement. On Day 4, the State requests 30 percent of the funds to pay for checks presented on Day 5, and so on. Furthermore, if the State draws down \$400,000 to pay for checks presented on Day 4, neither the State nor the Federal Government will incur an interest liability if the amount of checks actually presented is more or less than \$400,000. Over the long term, the amounts drawn down and the amounts of checks presented for payment will converge to the historical clearance pattern.

(c) *Pre-issuance funding.* Pre-issuance funding is a method of transferring Federal funds to a State prior to the day the State issues checks or initiates EFT payments. When this funding technique is applied, a State will incur an interest liability to the Federal Government from the day Federal funds are credited to a State account to the day the State pays out the funds for programs purposes.

*Example:* Three business days before a State issues \$1 million in checks, it requests \$1 million from a Federal agency, which deposits the funds in a State account the next day. The State has developed the following clearance pattern, based on when the State's checks historically have been presented for payment:

day	Percent of \$'s paid out
0 (funds deposited)	0
1	0
2 (checks issued)	0
3	0
4	0
5	40
6	30
7	15
8	10
9	5

The State will owe the Federal Government 5 days of interest on 40 percent of the funds, or \$400,000, since that amount will be paid out for checks presented 5 days after Federal funds are deposited in a State account. The State will owe 6 days of interest on 30 percent of the funds, or \$300,000, 7 days of interest on 15 percent of the funds, and so on.

(d) *Average clearance.* Average clearance is a method of transferring funds to a State based on the dollar-weighted average number of days required for funds to be paid out by the State after a disbursement. Neither the

Federal Government nor a State will incur an interest liability when this funding technique is properly applied.

*Example:* A State mails \$1 million in checks to contractors for a Federally funded program. The State has developed the following clearance pattern, based on when checks historically have been presented for payment, and has determined the average day of clearance, weighted by dollar amount, to be 5 days after checks are issued:

Day	Percent of \$'s paid out	Factor (day x percentage)
0 (checks issued)	0	
1	0	
2	0	
3	0	
4	40	1.60
5	30	1.50
6	15	0.90
7	10	0.70
8	5	0.40
Average day of clearance		5.10

The State requests \$1 million on day 4 and receives that amount on day 5, which is the dollar-weighted average number of days required for checks to be presented at the State's bank, and neither the State nor the Federal Government incurs an interest liability.

(1) In determining a dollar-weighted average day of clearance, fractions of days are rounded to the nearest whole number.

(2) The standards and maintenance requirements for clearance patterns, as set forth in § 205.8, apply for average day of clearance calculations.

(e) *Reimbursable funding.* Reimbursable funding is a method of transferring Federal funds to a State after the State has paid out its own funds for program purposes. After June 30, 1994, reimbursable funding is prohibited, except where mandated by Federal law.

#### § 205.7 Requesting and transferring funds.

(a) *Electronic funds transfer.* To the maximum extent practicable, a Federal agency shall use EFT for transfers of funds to a State.

(b) *Minimizing the time between transfer and payment.* A State and a Federal agency shall minimize the time elapsing between the transfer of funds from the United States Treasury and the pay out of funds for program purposes by a State, whether the transfer occurs before or after the pay out.

(c) *Procedures for funding techniques.* Unless otherwise specified in a Treasury-State Agreement, a State and a Federal agency shall adhere to the

following procedures for each funding technique:

(1) *Zero balance accounting.* A State shall request funds the same day it pays out funds for program purposes, and a Federal agency shall deposit funds in a State account the same day it receives a request for funds.

(2) *Estimated clearance.* A State shall request funds 1 business day prior to the day it expects to pay out funds, in accordance with a clearance pattern, and a Federal agency shall deposit funds in a State account the next business day after receiving a request for funds.

(3) *Average clearance.* A State shall request funds 1 business day prior to the dollar-weighted average number of days required for funds to be paid out after a disbursement, and a Federal agency shall deposit funds in a State account the next business day after receiving a request for funds.

(4) *Pre-issuance funding.* A State shall request funds not more than 3 business days prior to the day on which it makes a disbursement, and a Federal agency shall deposit funds in a State account the next business day after receiving a request for funds.

(5) *Reimbursable funding.* A State shall request funds only after it has paid out its own funds for programs purposes, and a Federal agency shall deposit funds in a State account the next business day after receiving a request for funds.

(d) *Limiting the amount transferred.* Consistent with a funding technique and with funds transfer procedures in a Treasury-State Agreement, a State and a Federal agency shall limit the amount of funds transferred to a State to the minimum required to meet a State's actual, immediate cash needs.

(e) *Frequency of requests for funds.* A Federal agency shall allow a State to submit requests for funds, or bills, as often as daily. However, this requirement shall not be construed to change Federal agency guidelines defining a properly completed request for funds.

(f) *Prohibition of reimbursable funding requirements.* A Federal agency may not require a State to use reimbursable funding, unless mandated by Federal law.

#### § 205.8 Clearance patterns.

(a) *Use and basis of development.* When required by a funding technique a clearance pattern will be used to schedule the transfer of funds to a State and to support the calculation of interest. A State may:

(1) Develop a separate clearance pattern for an individual program; or

(2) Develop a composite clearance pattern for a logical group of programs that have the same disbursement method and that reasonably can be expected to have comparable clearance activity. A composite clearance pattern for a group of programs must be applied separately to each program in the group when scheduling funds transfers or calculating interest; or

(3) Develop a clearance pattern on another basis that is agreed upon by the FMS.

(b) *Standards for clearance patterns.* A State shall ensure that a clearance pattern accurately represents the flow of Federal funds and that a clearance pattern reflects seasonal or other periodic variations in clearance activity. A State shall ensure that a clearance pattern is auditable.

(c) *Maintaining clearance patterns.* (1) If a State has actual or constructive knowledge, at any time, that a clearance pattern does not correspond to a program's clearance activity, or if a program undergoes operational changes that may affect clearance activity, the State shall:

(i) Immediately notify the FMS in writing of the program requiring a new clearance pattern, and

(ii) Develop a new clearance pattern and certify that it corresponds to a program's clearance activity.

(2) If a Federal agency has actual or constructive knowledge, at any time, that a State's clearance pattern does not correspond to a program's clearance activity, the agency shall notify the FMS in writing of the State and the program. The FMS shall immediately notify the State of the programs, and the State shall either:

(i) Develop a new clearance pattern and certify that it corresponds to a program's clearance activity, or

(ii) Re-certify the accuracy of the existing clearance pattern.

(d) *Certification for accuracy.* An authorized State official shall certify that a clearance pattern corresponds to a program's clearance activity. If a State develops a clearance pattern for a program or a group of programs, as set forth in paragraphs (a)(1) and (a)(2) of this section, an authorized State official shall re-certify the accuracy of the clearance pattern at least every 5 years. If a State develops a clearance pattern on another basis, as set forth in paragraph (a)(3) of this section, the FMS may prescribe requirements for re-certifying the accuracy of the clearance pattern.

#### § 205.9 Treasury-State Agreements.

(a) *Purpose.* A State may enter into a Treasury-State Agreement with the FMS to set forth terms and conditions for implementing this subpart.

(b) *Components.* A Treasury-State Agreement pursuant to this subpart must include, but will not be limited to, the following:

(1) *Programs.* Consistent with § 205.4, a Treasury-State Agreement must indicate the programs subject to this subpart.

(2) *Funding techniques.* A Treasury-State Agreement must indicate the funding techniques to be applied to the programs subject to this subpart, in accordance with the following:

(i) Zero Balance Accounting, Estimated Clearance, and Pre-issuance Funding are techniques available for selection by a State, subject to the approval of the FMS.

(ii) A State may request approval to use the Average Clearance funding technique, but must provide the FMS with adequate justification for its use in lieu of Estimated Clearance.

(iii) Reimbursable funding is available for selection by a State, subject to the approval of the FMS, only for a program for which the State used reimbursable funding prior to October 24, 1992. However, reimbursable funding is not available for selection by a State for the programs listed in § 205.4(a).

(iv) A State and the FMS may negotiate the use of other mutually agreed upon funds transfer procedures.

(v) A State may apply more than one funding technique or funds transfer procedure to a program with multiple cash flows.

(3) *Interest calculation method.* Consistent with § 205.13, a Treasury-State Agreement must indicate the method a State will use to calculate and document interest liabilities pursuant to this Subpart.

(4) *Clearance pattern method.* Consistent with § 205.8, a Treasury-State Agreement must indicate the method and standards a State will use to develop and maintain clearance patterns pursuant to this subpart.

(5) *Direct costs.* Consistent with § 205.14, a Treasury-State Agreement must specify the types of direct costs a State expects to incur.

(6) *Reverse flow programs.* Consistent with §§ 205.8 and 205.13, with respect to programs for which the Federal Government makes payments on behalf of a State, a Treasury-State Agreement must indicate the methods a Federal agency will use to calculate and document interest liabilities and to develop and maintain clearance patterns pursuant to this subpart.

(c) *Consultation with Federal agencies.* The FMS will consult with Federal program agencies as necessary and appropriate when negotiating a Treasury-State Agreement.

(d) *Amendment.* A Treasury-State Agreement may be amended by the mutual written consent of the State and the FMS.

(e) *Five-year expiration.* A Treasury-State Agreement expires if it is not amended for 5 years.

(f) *Default provisions for a State without a Treasury-State Agreement after the Onset Period.* With respect to a State that does not have a Treasury-State Agreement in effect after the later of June 30, 1993, or the last day of the State's 1993 fiscal year, the following apply:

(1) The FMS shall prescribe funds transfer procedures to be used by the State and a Federal agency in implementing this Subpart, consistent with Federal and State law.

(2) The FMS shall prescribe the method for calculating interest liabilities pursuant to this subpart.

#### § 205.10 Funding of indirect costs and administrative cost grants.

(a) A State and the FMS may agree, in a Treasury-State Agreement, to the following funding conventions for indirect costs and administrative cost grants:

(1) The State will draw down a prorated amount of an administrative cost grant on the date of the State payday. For example, the State would draw one-third of a quarterly administrative cost grant if payroll is monthly, or one-sixth of a quarterly administrative cost grant if payroll is semi-monthly.

(2) If an indirect cost rate is applied to a program, the State will include a proportionate share of the indirect cost allowance in each drawdown by applying the indirect cost rate to the appropriate direct costs of each drawdown.

(3) If costs must be allocated to various programs pursuant to a labor distribution or other system under an approved cost allocation plan, the State will draw down funds to meet cash outlay requirements based on the most recent, certified cost allocations, with subsequent adjustments pursuant to the actual allocation of costs.

(b) A State and the FMS may agree, in a Treasury-State Agreement, that no interest liabilities will be incurred or calculated for indirect costs and administrative cost grants, notwithstanding any other provision of this subpart.

**§ 205.11 Federal interest liabilities.**

(a) *General.* The Federal Government will incur an interest liability to a State if the State pays out its own funds for program purposes with valid obligational authority under Federal law, Federal regulation, or Federal-State agreement. A Federal interest liability will accrue from the day a State pays out its own funds for program purposes to the day Federal funds are credited to a State account.

(b) *Late appropriations.* If a State pays out its own funds for program purposes due to delay in passage of a Federal appropriations act, the Federal Government will incur an interest liability if an appropriations act, as enacted, covers the period of the State's expenditure and permits payment for expenses already incurred by the State.

(c) *Lack of obligational authority other than occurring through late appropriations.* If a State pays out its own funds for program purposes without obligational authority, the Federal Government will incur an interest liability if the lack of obligational authority is not the result of limitation, reduction, or termination of the program and where obligational authority is subsequently established to permit payment for the State's expenditure.

(d) *Federal Highway Trust Fund.* The following applies to programs and projects funded out of the Federal Highway Trust Fund, notwithstanding any other provision of this section:

(1) If a State does not request funds at least weekly for current project costs, a Federal interest liability will not accrue prior to the day a State submits a request for funds.

(2) If a State pays out its own funds in the absence of a project agreement or in excess of the Federal obligation in a project agreement, the Federal Government will not incur an interest liability.

(e) *Discretionary grant project approval.* If a State pays out its own funds prior to the earlier of (1) The day a Federal agency officially notifies the State in writing that a discretionary grant project has been approved, or (2) The date that a Federal agency is otherwise obligated in law to pay the discretionary grant project to the State, the Federal Government will not incur an interest liability, notwithstanding any other provision of this section.

(f) *Authorizations and appropriations for future years.* If a State pays out its own funds prior to the availability of Federal funds that have been authorized or appropriated for a future Federal fiscal year, the Federal Government will not incur an interest liability,

notwithstanding any other provision of this section.

(g) *Reverse flow programs.* With respect to programs for which the Federal Government makes payments on behalf of a State, such as Supplemental Security Income, the Federal Government will incur an interest liability if State funds are in a Federal Government account prior to the day a Federal agency pays out funds for program purposes. A Federal interest liability will accrue from the day State funds are credited to the Federal Government's account to the day the Federal agency pays out the State funds for program purposes.

**§ 205.12 State interest liabilities.**

(a) *General.* A State will incur an interest liability to the Federal Government if Federal funds are in a State account prior to the day the State pays out funds for program purposes. A State interest liability will accrue from the day Federal funds are credited to a State account to the day the State pays out the Federal funds for program purposes.

(b) *Refunds.* A State will incur an interest liability to the Federal Government on a refund transaction of Federal funds. A State interest liability will accrue from the day the refund is credited to a State account to the day the refund is either paid out for program purposes or credited to a Federal Government account. However, a State may adopt a transaction threshold not exceeding \$10,000, below which the State will not incur an interest liability on a refund transaction.

(c) *Reverse flow programs.* With respect to programs for which the Federal Government makes payments on behalf of a State, such as Supplemental Security Income, a State will incur an interest liability to the Federal Government if a Federal agency pays out Federal funds for program purposes on behalf of the State. A State interest liability will accrue from the day the Federal agency pays out Federal funds for program purposes to the day State funds are credited to the Federal Government's account.

(d) *Exception.* Notwithstanding any other provision in this section, a State will not incur an interest liability to the Federal Government if Federal law requires that the interest a State earns on Federal funds must be retained by the State or used for program purposes. This exception shall not be construed to exempt a program from any other provision of this subpart.

**§ 205.13 Interest calculation.**

(a) *State responsibilities.* A State shall calculate Federal interest liabilities and State interest liabilities for each program subject to this subpart, except as provided for in paragraph (b) of this section.

(b) *Reverse flow programs.* A Federal agency shall calculate Federal interest liabilities and State interest liabilities for a program subject to this subpart for which the Federal agency makes payments on behalf of a State, such as Supplemental Security Income.

(c) *Start date.* Interest liabilities begin accruing October 24, 1992.

(d) *Interest rate.* The interest rate for all interest liabilities pursuant to this subpart is the annualized rate equal to the average equivalent yields of 13-week Treasury Bills auctioned during a State's fiscal year, except as provided for in paragraph (f) of this section. The FMS will provide this rate to each State.

(e) *Interest calculation method and standards.* A State shall calculate and report interest liabilities on the basis of its fiscal year. A State shall ensure that its interest calculations are auditable. As set forth in § 205.9, a Treasury-State Agreement must include the method a State will use to calculate and document interest liabilities pursuant to this subpart.

(f) *Statistical sampling.* If a State uses statistical sampling to calculate interest, the State must randomly sample transactions for each program subject to this subpart to ensure, at a minimum, a 95 percent confidence interval subject to a .3 dollar-weighted day bound of error estimate.

(g) *Onset Period.* A State shall determine interest liabilities for the Onset Period, which is from October 24, 1992, to the later of June 30, 1993, or the last day of the State's 1993 fiscal year, in accordance with § 205.5.

(h) *Transactions prior to a State's 1994 fiscal year.* Consistent with the provisions of § 205.5, a State shall not include in an interest calculation a transaction in which either the transfer of funds to the State or the pay out of funds for program purposes by the State occurs prior to the later of July 1, 1993, or the first day of the State's 1994 fiscal year.

(i) *Funds withdrawn from a State account in the Unemployment Trust Fund (UTF).* A State shall account for the actual interest earnings and the related banking costs attributable to funds withdrawn from the State's account in the UTF.

(1) If funds withdrawn from the several accounts in the UTF are commingled in the State's



Unemployment insurance benefit payment account, the funds withdrawn from the State's account must be allocated a pro rata share of the actual interest earnings and related banking costs of the benefit payment account. Funds withdrawn from the State's account in the UTF that are included in investment pools must be allocated a pro rata share of interest earnings of the investment pool.

(2) Notwithstanding any other provision of this subpart, a State's interest liability on funds withdrawn from its account in the UTF consists of the actual interest earnings less the related banking costs of such funds, and shall be deposited in the State's account in the UTF.

(3) This paragraph (i) does not apply to funds withdrawn from the Federal Employees Compensation Account and the Extended Unemployment Compensation Account in the UTF.

#### § 205.14 Direct costs of implementation.

(a) *Definition.* Direct costs of implementing this subpart are those costs necessary for the development and maintenance of clearance patterns and those costs necessary to perform the actual calculation of interest liabilities. Direct costs do not include expenses incurred for upgrading or modernizing of accounting systems.

(b) *Reimbursement of direct costs.* A State will be compensated annually for the direct costs of implementing this subpart, subject to the following conditions and limitations.

(1) *Treasury-State Agreement.* A State must have a Treasury-State Agreement with the FMS, as set forth in § 205.9.

(2) *Direct cost claim.* A State must submit a claim for direct costs with its Annual Report, as set forth in § 205.15(c).

(3) *Documentation.* A State must maintain documentation to substantiate its claim for direct costs.

(4) *Eligibility of costs.* Direct costs in excess of \$50,000 in any year are not eligible for reimbursement, unless a State can justify to the FMS that it would be unable to develop clearance patterns or perform the actual calculation of interest without incurring such costs.

(5) *Costs incurred in prior years.* Direct costs incurred prior to a State's most recently completed fiscal year are not eligible for reimbursement, excepting costs incurred prior to the first day of a State's 1994 fiscal year and claimed for reimbursement with the State's first Annual Report submitted pursuant to this subpart.

(6) *Costs incurred prior to July 22, 1991.* Direct costs incurred prior to July

22, 1991, are not eligible for reimbursement, unless a State makes separate application for such costs, with adequate justification and documentation.

(7) *Review by the FMS.* The FMS will review all direct cost claims for reasonableness. Unreasonable cost claims, as determined by the FMS, will not be reimbursed, notwithstanding any other provision of this section.

(8) *Method of reimbursement.* The FMS will affect direct cost reimbursement by reducing the State interest liability and adjusting the Federal interest liability for each State, to the extent allowed by the following limitations:

(i) Interest liabilities for programs funded out of trust funds for which the Secretary is trustee may not be reduced or adjusted; and

(ii) The aggregate Federal interest liability for all States may not increase.

(c) *Application of cost principles.* A State shall not include direct costs of implementing this subpart, as defined in paragraph (a) of this section, in the development of its Statewide cost allocation plan, as provided for in OMB Circular A-87. All other costs incurred by a State to implement this subpart are subject to the procedures and principles of OMB Circular A-87.

(d) *Sunset review.* By July 1, 1996, the FMS will review the policies in this section to determine their effectiveness.

#### § 205.15 Annual Reports.

(a) A State shall submit an Annual Report to the FMS by December 31 accounting for the interest liabilities of the State's most recently completed fiscal year. The format of the Annual Report will be prescribed by the FMS and will include, at a minimum, the following:

(1) The Federal interest liability for each program subject to this subpart;

(2) The State interest liability for each program subject to this subpart, with the State interest liability on refunds for each program reported separately;

(3) The total Federal interest liability for all programs subject to this subpart;

(4) The total State interest liability for all programs subject to this subpart;

(5) The net total interest owed by the State or the Federal Government;

(6) For information purposes, not for the calculation of interest, the actual interest earnings on and the related banking costs for funds drawn from the State's account in the UTF.

(b) A State shall submit its Annual Report both in hard copy and either on computer diskette or by other electronic means prescribed by the FMS.

(c) A State may submit as part of its Annual Report a claim for reimbursement of the direct costs of implementing this subpart, in accordance with § 205.14. An authorized State official shall certify the accuracy of a State's direct cost claim.

(d) An authorized State official shall certify the accuracy of a State's Annual Report.

(e) *Reverse flow programs.* With respect to a program for which the Federal Government makes payments on behalf of a State, a Federal agency shall provide an interest report to a State by December 1 for the State's most recently completed fiscal year. The interest report will include the State interest liability and the Federal interest liability for the program, including the Federal interest liability on refund transactions of \$10,000 or more. The Federal agency shall certify the accuracy of the interest report. A State shall incorporate the interest report in its Annual Report.

(f) The FMS will distribute Annual Reports to Federal agencies.

#### § 205.16 Interest payment.

(a) *Adjusted interest liabilities.* The FMS will adjust a State's total interest liability and the Federal Government's total interest liability to a State to effect direct cost reimbursement, as set forth in § 205.14(b)(8).

(b) *Net interest payment.* The adjusted total State interest liability and the adjusted total Federal interest liability for each State will be offset to determine the net interest payable to or from a State. The payment of net interest to or from a State for its most recently completed fiscal year will occur no later than March 1.

(c) *Disputed amounts.* If the amount of interest payable is disputed according to the provisions of § 205.18, payment must occur for any undisputed portions. The interest in dispute must be paid within 14 days of receipt of the decision by the Assistant Commissioner, Federal Finance, as set forth in § 205.18.

#### § 205.17 Compliance and oversight.

(a) *State coordinator.* A State shall designate an official representative with the statutory or administrative authority to coordinate all interaction with the Federal Government concerning this subpart, and shall notify the FMS of the representative's name and title in writing.

(b) *Federal agency coordinator.* A Federal Agency shall designate an official representative to coordinate all interaction with the FMS and the States concerning this subpart, and shall notify



the FMS of the representative's name and title in writing.

(c) *Recordkeeping.* A State shall maintain records supporting interest calculations, clearance patterns, direct costs, and other functions directly pertinent to the implementation and administration of this subpart.

(d) *Record retention.* A State shall retain the records related to implementation of this subpart of each fiscal year for 3 years from the date the State submits its Annual Report, or until any dispute or action involving the records and documents is completed, whichever is later.

(e) *Availability of records.* The FMS, the Comptroller General, and a Federal agency shall have the right of access to all records for the purpose of verifying interest calculations, clearance patterns, direct cost claims, and the State's accounting for Federal funds.

(f) *Records for reverse flow programs.* With respect to programs for which the Federal Government makes payment on behalf of a State, a Federal agency shall maintain records supporting interest calculations and clearance patterns. A Federal agency shall retain such records for 3 years from the date the Federal agency submits its interest calculations to a State, as set forth in § 205.15(e), or until any dispute or action involving the records is completed, whichever is later. The FMS, the Comptroller General, and a State shall have the right of access to all records for the purpose of verifying interest calculations, clearance patterns, and the Federal agency's accounting for State funds.

(g) *State audits.* A State's implementation of this subpart is subject to audit in accordance with chapter 75 of title 31, United States Code, "Requirements for Single Audits."

(h) *Federal agency compliance reviews.* A Federal agency's implementation of this subpart is subject to review pursuant to procedural instructions issued by the FMS.

(i) *Reviewing Annual Reports.* The FMS will distribute Annual Reports to Federal agencies, as set forth in § 205.15(f). Upon request by the FMS, a Federal agency shall review a State's Annual Report for accuracy and reasonableness and shall report its findings to the FMS.

(j) *Federal agency noncompliance.* If a Federal agency egregiously or repeatedly causes Federal interest liabilities or fails to comply with this subpart, the FMS may collect a charge from the Federal agency in an amount the FMS determines to be the cost to the general fund of the Treasury caused by such noncompliance, in accordance with the following:

(1) The FMS will issue a Notice of Assessment to the Federal agency, indicating the nature of the noncompliance, the amount of the charge, the manner in which it was calculated, and the right to file an appeal.

(2) A charge for noncompliance, to the maximum extent practicable, will be paid out of appropriations available for the Federal agency's operations and will not be paid from amounts available for funding the programs of the Federal agency.

(3) If a Federal agency does not pay a charge for noncompliance within 45 days after receiving a Notice of Assessment, the FMS will debit the appropriate Federal agency account.

(4) A Federal interest liability resulting from circumstances beyond the control of a Federal agency does not constitute noncompliance.

(k) *State noncompliance.* If a State materially fails to comply with this subpart, the FMS may take one or more of the following actions, as appropriate in the circumstances:

(1) Request a Federal agency or the General Accounting Office to conduct an audit of the State to determine interest owed to the Federal Government, and implement procedures to recover such interest; or

(2) Deny the reimbursement of all or a part of the State's direct cost claim; or

(3) Take other remedies legally available.

(l) *Failure to request funds.* If a State repeatedly or deliberately fails to request funds in accordance with the procedures established for its funding techniques, as set forth in § 205.7 or in a Treasury-State Agreement, the FMS may deny the State payment or credit for any resultant Federal interest liability, notwithstanding any other provision of this part.

#### § 205.18 Appeals and dispute resolution.

(a) *Appeal by a Federal agency.* A Federal agency may appeal any charge assessed by the FMS for noncompliance by submitting an appeal in writing to the Assistant Commissioner, Federal Finance (hereinafter Assistant Commissioner), of the FMS, within 45 days of the date of the Notice of Assessment. The appeal shall include a concise factual statement of the conditions leading to the Notice of Assessment, the basis of the appeal, and the action requested by the agency. In the event of an appeal, the charge imposed under the Notice of Assessment will be deferred pending the results of the appeal.

(1) *Appeal review process.* The Assistant Commissioner will review the

Notice of Assessment, any documentation supporting the Notice, and the written appeal from the agency. If based on this review, the Assistant Commissioner finds that additional information is required, the Assistant Commissioner may request to meet with the agency, as well as other parties selected by the Assistant Commissioner, as part of the review process.

(2) *Decision.* The Assistant Commissioner will issue a written decision within 30 days of receipt of the appeal. The Assistant Commissioner may unilaterally extend this period for an additional 30 days if required. The decision of the Assistant Commissioner whether to uphold the Notice of Assessment, to overturn the Notice, or to mandate some other action will be stated in the written decision. Other actions mandated may include a reduced charge, a deferral of the charge, an alternate solution to cash management improvement, or any combination thereof. The basis of the decision, the amount of the charge and the effective date of the charge will be stated in the written decision. The effective date of the charge may be retroactive to the date indicated in the Notice of Assessment.

(b) *Resolution of disputes.* If a dispute arises from the implementation or administration of this Subpart, the following resolution mechanism is available:

(1) The aggrieved party may submit a written appeal to the Assistant Commissioner. The aggrieved party shall concurrently serve a copy of the written appeal to the other concerned parties.

(2) Within 30 days of the submission of the written appeal, the aggrieved party shall submit to the Assistant Commissioner a written statement not exceeding 15 pages, with supporting documentation in appendices, that articulates the dispute, the aggrieved party's position, and the relief sought. The aggrieved party shall concurrently serve its statement upon the other concerned parties.

(3) Within 30 days of receipt of the aggrieved party's statement, the responding party may submit a response statement not exceeding 15 pages, with supporting documentation in appendices, to the Assistant Commissioner. The responding party shall concurrently serve its response statement to the other concerned parties.

(4) The Assistant Commissioner will issue a written decision within 30 days after the period for the submission of the response statement. The Assistant

Commissioner may unilaterally extend the deadline for issuing a decision by 30 days if required. The Assistant Commissioner's decision shall be the final agency action on the part of the FMS for the purposes of judicial review procedures under the Administrative Procedures Act, 5 U.S.C. 701-706, unless either party invokes the provisions of the Administrative Dispute Resolution Act of 1990, 5 U.S.C. 581-593 (ADRA), in accordance with the following.

(i) Either party may seek to invoke the assistance of a neutral party appointed under the provisions of the ADRA within 30 days of receipt of the Assistant Commissioner written

decision. The party invoking the ADRA shall notify both the Assistant Commissioner and the responding party in writing. With the written mutual consent of the parties and the Assistant Commissioner, a neutral party appointed under the provisions of the ADRA may assist in resolving the dispute through the use of alternate means of dispute resolution as defined in the ADRA.

(ii) If the party invoking the ADRA is unable to reach a satisfactory resolution of the problem using the ADRA, the Assistant Commissioner's decision shall be the final agency action on the part of the FMS for purposes of the judicial

review procedures under the Administrative Procedure Act, 5 U.S.C. 701-706.

#### Appendix A to Subpart A of Part 285— Definition of Major Federal Assistance Program

*Major Federal Assistance Program, for State governments having Federal assistance expenditures between \$100,000 and \$100,000,000 means any program for which Federal expenditures during the applicable year exceed the larger of \$300,000, or 3 percent of such total expenditures. Where total expenditures during the applicable year exceed \$100,000,000, the following criteria apply:*

Total expenditure of federal financial assistance for all programs		Major federal assistance program means any program that exceeds (million)
More than	But less than (billion)	
\$100 million.....	\$1	\$3
1 billion.....	2	4
2 billion.....	3	7
3 billion.....	4	10
4 billion.....	5	13
5 billion.....	6	16
6 billion.....	7	19
Over 7 billion.....		20

#### Subpart B—Potential Liabilities on Intergovernmental Funds Transfers Included in the Catalog of Federal Domestic Assistance but Otherwise Generally Excluded From Subpart A

##### § 205.19 Scope of Subpart.

This subpart applies to programs in the Catalog of Federal Domestic Assistance that are not subject to subpart A.

##### § 205.20 Cash advances.

(a) Cash advances to a State shall be limited to the minimum amounts needed and shall be timed to be in accord only with the actual, immediate cash requirements of the State in carrying out a program or project. The timing and amount of cash advances shall be as close as is administratively feasible to the actual cash outlay by the State for direct

program costs and the proportionate share of any allowable indirect costs.

(b) Neither a State nor the Federal Government will incur an interest liability on the transfer of funds for a program subject to this subpart.

##### § 205.21 Federal agency oversight responsibilities.

(a) A Federal agency shall review the practices of States as necessary to ensure compliance with this subpart. A Federal agency shall notify the FMS if a State demonstrates an unwillingness or inability to comply with this subpart.

(b) A Federal agency shall formulate procedural instructions specifying the methods for carrying out the responsibilities of this section.

##### § 205.22 State noncompliance.

If a State demonstrates an unwillingness or inability to comply with this subpart, the FMS may require the State and a Federal agency to cover

additional programs under Subpart A of this part, notwithstanding any other provision of this part.

##### § 205.23 Failure to make funds available.

Consistent with program purposes and regulations, if a Federal agency demonstrates an unwillingness or inability to make Federal funds available to a State as needed to carry out a program, the FMS may require the State and the Federal agency to cover additional programs under Subpart A of this part, notwithstanding any other provision of this part.

#### Subpart C—[Reserved]

Dated: September 21, 1992.

Russell D. Morris,  
Commissioner.

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